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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

No. 1049

EDWARD RILEY and ORVILLE WATSON,
Petitioners,

vs.

THE STATE OF ILLINOIS,
Respondent.

REPLY

WM. SCOTT STEWART,
Counsel for Petitioners.

CHAMPLIN-SHEALY COMPANY, CHICAGO

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MAY IT PLEASE THE COURT:

We shall respectfully adopt the headings used by our learned opponents and make brief reply thereto.

Statement of the Case.

We point to the statement of the case as made in this Honorable Court by the prosecutors as an exhibition of their zeal to urge that the end justifies the means. Petitioners are guilty. An atrocious crime was committed. It

may very well be that the extreme penalty is the only one merited by them. Yet, we respectfully submit, the whole proceeding was but a mask and the petitioners are about to be lynched under the guise of law.

A.

The trial court did not admit incompetent and improper evidence in considering and determining the penalty to be imposed.

We respectfully submit that there can be no question from this record that incompetent and improper evidence was admitted. The Illinois Supreme Court said (p. 82):

> "We do not approve of the procedure in this case and careful prosecutors will avoid using it."

People v. *McWilliams*, 348 Ill. 333, cited by the People under this head, was reversed, and that said in *People* v. *Popescue*, 345 Ill. 142, we respectfully submit, was not necessary to the decision in that case. The *dictum* of the *Popescue* case is contrary to the established law as announced in the case at bar (p. 82).

B.

The attorneys who represented the petitioners in the trial court were of their own choosing and represented the petitioners competently in the trial proceedings.

This argument can be divided into two parts. We respectfully submit that the attorneys were not of the choosing of the petitioners and point to the record (Rec. 14A, Abst. 2). Their incompetency is obvious from the record, and is to be expected of such neophytes.

We respectfully refer your Honors again to our brief (p. 11).

C.

The Supreme Court of Illinois did not err in holding that the evidence introduced in the trial court was not prejudicial.

We have respectfully argued this point (p. 21), and in reply merely wish to point out that there were no certified copies. The People mislead the Supreme Court of Illinois into such an error in the first opinion, which error was corrected in the second opinion. That which was read to the court by the prosecutor was never even offered in evidence.

D.

Counsel for petitioners were allowed adequate and sufficient time in which to properly prepare for trial.

We have been all over this, as your Honors will see, in the courts below. In the first opinion your Honors will perceive that the People succeeded in getting the Illinois Supreme Court to agree with them, but upon rehearing the Illinois Supreme Court corrected some of these misapprehensions. We point to the record and respectfully repeat our respectful suggestion that the trial court erred in forcing petitioners to trial on the day incompetent counsel were appointed.

E.

The pleas of guilty made by the petitioners were properly entered.

Our learned opponents have said nothing new under this head, so we respectfully stand upon our argument as made (p. 27).

We realize that your Honors will be inclined to accept the decision of the Illinois courts on this subject and if this were our only point we could not get in this high court. But if we do succeed in obtaining this writ we seek consideration of the point.

F.

The Supreme Court of Illinois was correct in its statement that there is a difference in procedure between (1) a hearing in aggravation or mitigation of the penalty after a plea of guilty, and (2) the trial of a defendant before a jury after a plea of not guilty.

Here our learned opponents seek to build a man of straw for the purpose of demolishment. There is a difference in procedure and there was no trial before a jury. Yet, we respectfully contend that the law as heretofore decided by the Supreme Court of Illinois was not followed in the case at bar.

G.

The Supreme Court of Illinois has not been inconsistent in its holdings that error which could not have changed the result of the trial was not cause for a reversal.

Here again our learned opponents build of straw. We have no complaint as against the Supreme Court of Illinois in previous cases. We do not seek reversal upon *any* error. We respectfully submit that the error in the case at bar was prejudicial and harmful. The decisions of the Illinois Supreme Court are our guide.

H.

The prosecutor's argument in the trial court was proper since his remarks were based upon the evidence and justified thereby.

Here our learned opponents beg the question. The evidence was improperly admitted (the paper containing the so-called records of petitioners was not even offered in evidence). We respectfully submit that the argument was calculated to influence a mob.

I.

Since the killing for which petitioners were tried occurred during the commission of a felony, it is immaterial whether the police shot first or the defendant shot first.

As your Honors know, it makes no difference on the question of guilt whether the police shot first or the defendant Watson shot first. On the question of punishment, this question, among others, should be fairly considered. Also the fact that Riley did not shoot at all never seems to have been considered. Such matters in mitigation, we respectfully submit, can only be presented by competent counsel with a reasonable time for preparation.

J.

There was no discrimination against petitioners because they refused the services of the public defender in the trial court.

Our learned opponents go out of the record under this head. We do not feel that your Honors would care for any further discussion out of the record. If your Honors are going to take judicial notice of the *Russell* case, we trust that your Honors will consult the record, where the statement of our learned opponents is refuted. We are not concerned in the young lawyers who were appointed. They may be forgiven for accepting the appointment. Fools rush in where angels fear to tread. Our respectful suggestion is that the trial court failed in its duty. Much as our learned opponents would desire to contest some other issue that, after all, is the crux of this case.

Conclusion.

The attorneys for the defendants were admitted to the Bar February 13, 1939, and December 16, 1937, respectively (Petition for Rehearing, p. 20). These dates are a matter of record in the Supreme Court of Illinois. Said record can be certified here if necessary. The People now attempt a little confusion on this subject because we say four months one time and five months another time, concerning the length of time the chief attorney was at the bar. Upon study of the record your Honors will see that our calculation of the number of months differed because we were figuring from different phases of the case at different times.

The People insist here, contrary to the record, as they did below, that counsel was of the choice of the petitioners

and that the appointment was made to put counsel in a position to collect fees from the County. There is nothing in the Statute (Ill. Rev. Stat. 1937, Ch. 38, 769a) which provides that counsel must be appointed in order to be eligible for the money. We here respectfully set out all that appears in the record concerning the appointment (Rec. 14a, Abst. 2):

> "On June 14, 1939, parties present. Plea of defendants for appointment of private counsel allowed. Attorneys ..... appointed by the court to represent the defendants. Plea of not guilty heretofore entered as to said defendants withdrawn and plea of guilty entered as to each defendant."

The People here, as they did below, challenge present counsel to point out what he could possibly have done to save these petitioners from the death penalty. Your Honors will readily see the weakness of the position taken by the People. After a lynching the same voice might demand us to show what we could have done in court that would have changed the result. All we can say in closing is that in a city of the size of Chicago it would not have been difficult for the court to choose lawyers of experience, and, regardless of the result, a trial would have been had in accordance with the spirit of the law. With all due respect to the Supreme Court of Illinois, it seems that they could have reversed the case and another hearing could have been had in the year that that Honorable Court had this case.

As your Honors know, we are not asking for the liberty of these petitioners. All we seek is a hearing. As this Honorable Court said in *Powell* v. *Alabama*, 287 U. S. 45, 59, a defendant must not be stripped of his rights, and it is vain to give him his day in court with no opportunity to

prepare for it or to guarantee him counsel without giving the latter an opportunity.

The impatience of the attorneys for the People concerning the forms required by the law must be apparent from the brief filed in this Honorable Court. It is unfortunate for all concerned, including these petitioners, that so much time has been taken with this case, but we respectfully submit that the fault is upon the People who attacked the matter in the first place in the spirit of the mob.

We respectfully pray that the writ issue from this Honorable Court in order that this case be fully presented and thoroughly studied. We respectfully submit that our courts, the bar of our State and every fair-minded lover of justice will be grateful, in time, to be saved from the disgrace of the execution of these petitioners upon this record.

Respectfully submitted,

Wm. Scott Stewart,
Counsel for Petitioners.